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No. 87-1867

In The

Supreme Court of the United States

October Term, 1987

SANDRA TURNER, ET AL.

Petitioners,

v.

LINDA McMAHON, OTIS R. BOWEN, ET AL.

Respondents.

BRIEF OF STATE RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Until it was stayed by Justice Renquist in July 1984, the permanent injunction issued in the underlying action required the state and federal governments to pay more benefits to working AFDC recipients than they were entitled to receive under a proper reading of the law. The question presented by this appeal is whether those overpaid amounts are "overpayments" within the meaning of 42 U.S.C. § 602(a)(22), which mandates the state to take action to correct "any overpayment" of aid.

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STATEMENT

This is not a difficult or complicated case. It presents no knotty constitutional issues. To the contrary, it presents solely the application of a straightforward statute to uncomplicated facts.

Section 402(a)(22) of the Social Security Act (42 U.S.C. § 602(a)(22)) requires the States to take action to recoup "any overpayment" of aid in the AFDC program. As a result of the injunction in this case which was unanimously reversed by this Court, working AFDC recipients were paid more benefits than they were entitled to receive under the statutes. The Court of Appeals

held that the excess benefits were "overpayments" within the meaning of the statute and, therefore, could be recouped by the State.

In order to find error in the Court of Appeals decision, petitioners first argue that the phrase "any overpayment" is ambiguous and must be interpreted. Petitioners then resolve the ambiguity by arguing that Congress meant the phrase "any overpayments" to mean "some, but not all, overpayments." They then come up with a result that stands the world on its head by allowing States that negligently or intentionally violate federal law to recoup overpayments but denies recoupment to a State which did nothing wrong whatsoever.

As we shall see, petitioners' attempt to use blue smoke and mirrors to create the illusion of a legitimate issue before this Court does not understand analysis.

ARGUMENT

I

THE EXCESS PAYMENTS RECEIVED BY PETITIONERS ARE "OVERPAYMENTS" WITHIN THE MEANING OF 42 U.S.C. § 602(a)(22)

Beginning in 1981, Congress has mandated the States to correct "any overpayment or underpayment of aid" in the AFDC program. 42 U.S.C. § 602(a)(22).

The words "overpayment" and "underpayment" are not difficult to understand. They have a generally accepted meaning which, we imagine, could be easily stated by most elementary school children – a person is

overpaid and receives an overpayment when he receives more money than he is entitled to receive; a person is underpaid and suffers an underpayment when he receives less money than he is entitled to receive. The determination of whether a person has been overpaid or underpaid is a simple matter of comparison – you compare the amount paid with the amount that should have been paid. If the amount received is different than the amount the person was entitled to receive, there has been an overpayment or an underpayment.

The *reason* or *cause* for the difference between the amount received and the amount that should have been received is completely irrelevant to the question of whether, in fact, there was an overpayment or underpayment. There are literally scores of reasons or causes for an overpayment or underpayment. Some are caused by or are the fault of the recipients. For example, a recipient may fail to report a change in income or family size. Some are caused by or are the fault of the federal, state or county welfare departments. For example, the federal or state departments may promulgate a regulation which does not correctly apply the federal or state statutes. Or the county welfare workers may improperly apply a regulation to a particular fact situation. Some overpayments and underpayments are not caused by or the fault of either the recipient or the welfare departments – they are inherent in the way the system works. For example, "aid-paid-pending" a "fair hearing" is an overpayment if the recipient loses the appeal. 45 C.F.R. § 233.20(a)(13). Likewise, grants based on estimated income must be corrected after the fact to reflect actual income.

Congress very wisely did not attempt to create various catagories of "overpayments" or "underpayments" based on the reason for or cause of the payment error. To the contrary, Congress mandated the correction of *"any* overpayment or underpayment."

Thus, the Court of Appeals was entirely correct in concluding that the excess payments received by petitioners were "overpayments" within the "plain meaning" of the statute.

The Court of Appeals then did what it was supposed to do, namely, examine legislative history to determine whether Congress had indicated in clear terms that the plain meaning of the statute should not control. The Court properly concluded that Congress had not indicated any such intent.

Petitioners base their congressional intent argument on the fact that overpayments caused by erroneously issued injunctions are not specifically mentioned in the committee reports. The argument does not make sense. The failure to mention a specific type of overpayment in the committee reports does not in any way demonstrate congressional intent to exclude that type of overpayment from the phrase "any overpayment." There are many types of overpayments not specifically mentioned in the committee reports. For example, the committee reports make no mention of the overpayments that result from receiving "aid-paid-pending" an unsuccessful appeal or from adjusting grants based on estimated income. Yet, petitioners apparently concede that such overpayments are within the phrase "any overpayment."

In summary, the overpayments which resulted from the reversed injunction fall within the plain meaning of the phrase "any overpayment" in 42 U.S.C. § 602(a)(22). There is nothing in the committee reports or other legislative material which indicates that Congress intended to give those words anything other than their ordinary meaning.

II

PETITIONERS' ARGUMENTS LACK MERIT

In demonstrating that the excess payments in question were "overpayments" within the meaning of 42 U.S.C. § 602(a)(22) we, in effect, answered the main thrust of petitioners' claims. However, it is appropriate to separately discuss certain of petitioners' specific arguments.

A. The Alleged "Withdrawal Of Equitable Jurisdiction"

Petitioners allege that unless this Court adopts their "interpretation" of section 602(a)(22), the statute will operate to "withdraw equitable jurisdiction" from the district courts by implication, which is disfavored. That argument is premised on a complete misunderstanding of the nature of a trial court's "equitable jurisdiction."

Absent equitable powers, a court could do no more than enter a money judgment against a defendant who violated the law. A court with equitable powers, however, can grant other forms of relief when monetary relief would be inadequate. For example, a court, in the exercise of equitable powers, can issue orders for specific

performance, injunctions, restitution, writs of mandate and a host of other remedies. There is no question but that district courts have equitable powers.

But that does not mean that the district court, in the exercise of its equitable jurisdiction, can decide when and to what extent congressional mandates are to be enforced. District courts have equitable powers to carry out the policies established by Congress, not to fashion their own policies.

Petitioners rely on this Court's decision in *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944) for the proposition that, regardless of who is right as a matter of law, the district court, in the exercise of "equitable jurisdiction," can "balance the hardships and the public interest" and determine whether or not to grant an injunction to enforce the law. We do not believe that this Court's holding in *Hecht* goes nearly as far as petitioners assert. That point was made clear in this Court's more recent holding in *TVA* v. *Hill*, 437 U.S. 153 (1978).

TVA was an action brought under the Endangered Species Act of 1973 to enjoin the completion of the Tellico Dam and Reservoir Project on the ground that completion of the project would eliminate a "critical habitant" of the snail darter, an "endangered species." The district court refused to enjoin the completion of the then virtually completed multi-million dollar project on the ground that not every violation of the law had to be enjoined and that he had "equitable jurisdiction" to consider the "public interest" in seeing the project completed. This Court affirmed the Court of Appeals' reversal. In this Court the

petitioner cited the *Hecht* case, as the petitioners in this case have. This Court responded, pages 194-195,

> "But these principles take a court only so far. Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), it is equally--and emphatically--the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.
>
> * * *
>
> "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. . . .
>
> * * *
>
> "We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches."

That same rule was reiterated as recently as June 17 of this year in a different context in *INS* v. *Pangilinan*, ___ U.S. ___, 48 CCH S.Ct. Bull. p. B 2801 (1988), at 2807-8.

Congress no more intruded upon the "equitable jurisdiction" of the district court when it established the policy that "any overpayment" should be repaid than it did when it established the policy of protecting "endangered species," even in those situations where a particular district court judge might think it "inequitable" to do so.

In clear, unmistakable terms, Congress has dictated that overpayments must be repaid. District courts cannot, under the guise of "equitable jurisdiction," act in such a way as to defeat that policy.

B. The Alleged "Chilling Effect"

Petitioners assert that:

> "The decision [of the Court of Appeal] creates a chilling effect that will pervade all litigation around policies and practices of the AFDC program."

That far-fetched statement is supported by nothing more than petitioners' own *ipse dixit*.

In *Arkadelphia Co.* v. *St. Louis Ry. Co.*, 249 U.S. 134 (1919), the plaintiff railroads had obtained an injunction enjoining the State from enforcing certain passenger and freight tariffs. After the injunction was reversed by this Court, the question arose as to whether the plaintiffs had to pay back to the shippers the difference between what they actually collected and what they would have collected had the injunction not been issued. This Court referred to those amounts as "overcharges" (249 U.S., 143) which had to be repaid, stating, page 145,

> "But, in our opinion, this portion of the claims is allowable against the railway companies themselves upon the principle, long established and of general

> application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period."

It is nothing less than silly to suggest that the rule recognized so long ago by this Court has had a "chilling effect" on litigation.

The rule advocated by petitioners, on the other hand, could have a devastating effect on the federal and state treasuries, which are already at the breaking point. Petitioners would create a one-way street – a "heads they win, tails we lose" situation in which the plaintiffs would keep the money to which they were never entitled. To obtain a TRO or injunction in a "poor people" versus "the government" case is not difficult, particularly when the plaintiff's attorneys come to court wearing the mantle of the "public interest." It is not hard to imagine what would occur if the trial courts knew, under the rule advocated by petitioners, that they had *carte blanche* to give away state and federal dollars without any real threat that the money might have to be repaid. (Remember, in this case alone the cost of the erroneously issued injunction required the State to overpay recipients at the rate of $2.5 million per month.) And once a TRO or injunction was issued, there would be no incentive to move the case to a speedy conclusion. To the contrary, plaintiffs would be encouraged to drag their feet, as they did in this case, and delay the case at every stage. (Thus, in the present case we find ourselves in 1988 still trying

to conclude litigation that started with the implementation of the Omnibus Budget Reconciliation Act of 1981.)

In short, the decision of the Court of Appeal will not result in a "chilling effect" on welfare litigation. Nor does it confront the plaintiffs with a "Hobson's choice." To the contrary, it simply puts welfare litigants in the same position as other litigants, namely, if they want to seek equity (i.e., obtain an injunction and reap the benefits of the trial court's decision pending appeal) they must also do equity (i.e., repay the money if they eventually lose.)

C. The Alleged Lack of "Plain Meaning"

To support their contention that "overpayment" is an ambiguous word with no "plain meaning," petitioners cite 42 U.S.C. § 603(i) and state that "overpayment" has a different meaning there than in section 602(a)(22). The contention is wrong. Section 601(i) imposes fiscal sanctions upon a state if its rate of "erroneous excess payments" exceeds established tolerance levels. The statute imposes what is generally referred to as the federal agency's "quality control" ("QC") program. The purpose of a QC audit is to determine whether the State was properly running its AFDC program during the period being audited. It would most certainly be wrong to say that a State was not properly running its AFDC program because it was complying with an injunction that was being appealed. But after the injunction has been reversed and the court-ordered payments are collectable overpayments, the federal agency could certainly hold that the failure to recoup the overpayments resulted in "overpayments" for QC purposes. For example, if the State paid $700 to a family that would only be paid $680

if mandatory recoupment had been initiated, there would certainly be an "overpayment" of $20 for QC purposes. Therefore, there is absolutely no inconsistency between the use of the terms "overpayment" in sections 602(a)(22) and 603(i).

Petitioners state that the overpayments in question are not "overpayments" because, in petitioners' words, "HHS and state welfare agencies never treated them that way before this litigation." The simple answer is that this is the first case in which the issue has arisen since the enactment of section 602(a)(22) in 1981. Prior to that time, the States could decide when and to what extent, if any, overpayments would be collected. Petitioners assert that 42 States had an overpayment recovery policy and that "neither the federal nor state governments have identified a single case where the term 'overpayment, was extended to court-ordered payments prior to this case." In making that statement, petitioners forget the fact that they, as the plaintiffs, had the burden of proof. It was not up to the federal or state defendants to affirmatively disprove every unsupported factual statement made by petitioners' counsel. And the failure to do so does not make the unsupported statement true. In any event, neither HHS nor California was in any position to know what every State did in every case in the past.

D. Petitioner's Equity Rhetoric

The petition is replete with policy rhetoric in which petitioners really do no more than voice their disapproval of the basic requirement that overpayments be corrected. For example, it is alleged that having a current grant

reduced by up to 10 percent to recoup a past overpayment is "devastating". As held by this court in *Bowen* v. *Gilliard*, 483 U.S. ___, 97 L.Ed.2d 485, 107 S.Ct. 3008 (1987), at 3014-15,

> "The District Court was undoubtedly correct in its perception that a number of needy families have suffered, and will suffer, as a result of the implementation of the DEFRA amendments to the AFDC program. Such suffering is frequently the tragic by-product of a decision to reduce or to modify benefits to a class of needy recipients. Under our structure of government, however, it is the function of Congress-not the courts – to determine whether the savings realized, and presumably used for other critical governmental functions, are significant enough to justify the costs to the individuals affected by such reductions."

It should be obvious that the alleged "hardships" imposed by recoupment of prior overpayments apply to all overpayment recoupments, regardless of the reason for or cause of the overpayment. As explained earlier, overpayments and underpayments can occur for any number of reasons – some caused by recipient error, some cause by county error, and some resulting from the way the system operates. Assume, for example, that California had misread the 1981 OBRA income computation amendments and had computed all AFDC grants by using net rather than gross income in making grant computations. Petitioners would then concede that all the overpayments at issue in this case would have been caused by "agency error" and were, therefore, "overpayments" that had to be corrected. Yet all the alleged "hardships" would still be present. As far as any individual family is concerned,

it makes not a whit of difference whether the overpayment was caused by a court order or by agency error. The burden of paying it back is the same in either case. Yet, Congress has mandated that "any overpayment" be corrected. Congress dealt with the equitable considerations by limiting the rate of recovery to no more than 10 percent of the maximum grant amount per month. If petitioners are dissatisfied with the way Congress mandated the AFDC "overpayment" statute to operate, they should ask Congress to amend the statute to make it read like the SSI "overpayment" provision, which allows the Secretary to waive overpayment collections where the recipients were "without fault." 42 U.S.C. § 1383(b).

CONCLUSION

The decision of the Court of Appeal is correct. As a result of the erroneously issued injunction, petitioners received more money than they were entitled to receive under a proper reading of the statutes. Accordingly, they received more money than equivalent families in other States where the courts refused to enter such injunctions. Having to repay the monies they should never have received in the first place does not violate the statute or principles of equity.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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